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ALDO P. STUNTZ, STAFF DIRECTOR/CHIEF COUNSEL

**U.S. House of Representatives**  
**Subcommittee on Oversight and Investigations**  
**of the**  
**Committee on Energy and Commerce**  
**Washington, DC 20515-6110**

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May 3, 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

EX PARTE OR LATE FILED

Mr. William Kennard  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

ET Dkt. No.  
92-100

Dear Mr. Kennard:

Pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, the Subcommittee of Oversight and Investigations of the Committee on Energy and Commerce is investigating the Commission's so-called "Pioneer's Preference" policy, specifically with respect to the Commission's procedures and ultimate decision to award a "Pioneer Preference" to four companies earlier this year.

Four allegations concerning the Commission's decision are of particular interest to the Subcommittee: that the Commission's rules were egregiously and repeatedly violated; that the Commission's own behavior encouraged ex parte contacts and foreclosed opportunities for notice and comment; that the value of the "Pioneer Preference" awarded by the Commission is substantially in excess of the value of the contributions of the so-called "Pioneers"; and that the Commission's procedures were not sufficiently rigorous so as to justify the bestowal of an award as valuable as a "Pioneer Preference".

There may be some benefit to continuing to award "Pioneer Preferences" subsequent to the enactment of legislation authorizing the Commission to use competitive bidding procedures to license spectrum assignments. However, those awards must be based on hard scientific data, and must be granted pursuant to the rigorous enforcement of the Commission's rules so as to protect the consideration of the merits of the applicants from political or lobbying pressure. The Subcommittee is not satisfied that the Commission's consideration and procedures met this test.

Inasmuch as Chairman Hundt is recused from participating in this matter, and one of the participants (Commissioner Duggan) is

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Mr. William Kennard

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no longer a member of the Commission. I am writing to ask that you assist the Subcommittee in its investigation by responding to the following questions:

1. Was the Commission's decision in the matter styled "ET Docket No. 93-266" made at an open meeting? Or was this decision made utilizing the Commission's "circulation" procedures?
2. It is my understanding that the Commission's practice is to release immediately the text of Commission decisions made using the Commission's "circulation" procedures. It is also my understanding that the "circulation" practice involves a series of sequential edits to tentative decisions by the participating Commissioners, and accompanying "pink sheets" to colleagues explaining the reasons for changes.
  - a. When was the text of the Commission's decision in the above-referenced Docket released?
  - b. Please describe the "circulation" process to the Subcommittee in detail.
  - c. In formulating your answer to question 2(a) above, did you have access to the "pink sheets"? Were you able to determine whether significant changes were made after the announcement of the decision on December 23 and prior to the release of the text of the Commission's decision?
  - d. Are you aware of any cases involving other Commission decisions that were made "on circulation" in which the text of the decision was not released for more than 30 days?
3. Are you able to account for the reasons for the delay in the release of this text?
4. During the period between the announcement of a Commission decision and the release of the text of that decision, it is my understanding that the subject proceeding is restricted under the Commission's rules. Are you aware of any contacts by entities designated as "pioneers" during the period beginning when the Commission's decision was announced and ending when the text of that decision was released? In your response, please include any contacts in the above-referenced proceeding and any other proceedings, including filings made with respect to experimental licenses.

5. The Subcommittee is aware of correspondence between several parties to the above-referenced proceeding and the Commission's Managing Director. Several of these letters include allegations which, if true, could constitute serious violations of Commission rules. Among the correspondence to which I refer are the following:

Letter from Michael K. Kellogg to Andrew S. Fishel (January 26, 1994).

Letter from Mark J. Tauber to Andrew S. Fishel (February 1, 1994).

Letter from Werner K. Hartenberger and Laura H. Phillips to Andrew S. Fishel (February 4, 1994).

Letter from Jonathan D. Blake, Kurt A. Wimmer to Andrew S. Fishel (February 4, 1994).

Letter from Michael K. Kellogg to Andrew S. Fishel (February 23, 1994).

Letter from Jonathan D. Blake, Kurt A. Wimmer to Andrew S. Fishel (March 8, 1994).

Letter from Michael K. Kellogg to Andrew S. Fishel (March 16, 1994).

Letter from Jonathan D. Blake, Kurt A. Wimmer to Andrew S. Fishel (March 25, 1994)

Please obtain copies of this and other relevant correspondence and submit to the Subcommittee your analysis of the allegations contained therein. Please supply any documents necessary to support your conclusions.

6. On what date, or dates, did the Commission's "Pioneer Preference" process become a restricted proceeding? Did the Commission issue any announcement or otherwise inform the public as to the date or the nature of the restrictions that would pertain? If so, please provide copies of any such announcements to the Subcommittee.
7. Did the staff that was preparing recommendations to the Commissioners with respect to "Pioneer Preference" designations have substantive contact of any sort with applicants after the date on which the preference proceeding was considered restricted? For example, were any of the staff who participated in making recommendations to the Commission on pioneer preference

entitlements also reviewing reports concerning experimental licenses filed by the applicants after the date the pioneer preference proceeding was considered restricted?

8. Please identify the dates, participants in, and specific subjects of all meetings, conversations or communications of any sort between Commission staff or Commissioners and any of the four applicants ultimately designated as "pioneers" after the dates on which the Commission considers the proceedings to have been restricted. Please include any contacts which addressed personal communications services in general; experimental licenses held by applicants (including technical trials or reports of any sort related thereto); or any contacts related to the "pioneer preference" rules as considered in Docket 93-266 or more generally. In your response, please include a listing of all contacts, including those considered to be status inquiries.

Please provide a copy of all written materials submitted to the Commissioners or staff with respect to the above issues.

9.
  - a. Do any of the technical or other reports on the experimental licenses of the four applicants who received a "pioneer preference" award, filed on or after the dates on which the Commission considers the PCS "Pioneer Preference" proceeding to have become restricted, address or respond to arguments made by commenters concerning any of the recipient's qualifications to receive a pioneer preference?
  - b. If your answer to the above question is "no", please address your understanding of the meaning of Mtel's statement in its progress report, filed June 29, 1992, that "Mtel decided to revise its planned test schedules and first evaluate its Multi-Carrier Modulation ("MCM") techniques in order to conclusively address comments made by other parties in response to Mtel's June 1, 1992, NWN Technical Feasibility Demonstration", and its submission therein of materials bolstering its claim that it could achieve the data rates for which it ultimately was awarded a preference.
  - c. Were any of the reports filed in the Experimental License files by the four "Pioneer Preference" recipients served by those recipients on parties opposing their "Pioneer Preference" awards? Did

the Commission's rules require service of these reports on the entities opposing the "Pioneer Preference" awards made by the Commission?

- d. Were any procedures established by the Commission to notify opponents to the awards that the reports had been received, or that the recipients had met with Commissioners or Commission staff regarding the experimental licenses, or reports associated therewith? If not, would such notice and opportunity to comment have been proper?
  - e. Has the Commission determined that no ex parte information received by the Commissioners or Commission staff on or after the dates on which the proceedings became restricted was considered by the staff in its recommendations that the "Pioneer Preference" recipients were so entitled? If so, what is the basis for such a determination?
  - f. Has the Commission determined that no ex parte information received by the Commissioners themselves, either directly or through the staff, on or after the date the proceedings became restricted, was considered in determining whether the recipients were entitled to "Pioneer Preferences"? If so, what is the basis for such a determination?
10. With respect to the four entities ultimately designated as recipients of "Pioneer Preference" awards, please respond to the following questions:
- a. On what dates did Commission personnel visit the sites at which experiments were conducted to verify the results of the trials?
  - b. Please furnish the Subcommittee with the names and titles of all such personnel.
  - c. Please describe the reports that were drafted subsequent to site visits.
  - d. How were such reports treated by the Commission? Were they placed in the Public File? Were they released to the public so as to permit comments? Please detail any comments that were received by the Commission in response to their release to the public.

- e. Did the Commission establish an internal review process for such reports? Please list the names and titles of all Commission personnel involved in such a review.
  - f. Did the Commission establish a "Peer Review" process for the independent review of testing results? If so, please furnish the Subcommittee with a description of such a process, including the names and credentials of any "Peer Review" panel that examined and verified test results.
11. With respect to the site visits referred to above, please furnish the Subcommittee with the following information:
- a. During the conduct of the testing, how many channels were utilized for each applicant during each test?
  - b. What channel assignments were utilized for each test? Were these the same channel assignments, or at least in the same frequency band, as the assignments that had been granted for the four recipients of the "Pioneer Preference" designation? If not, how does the Commission intend to enforce its condition that "each licensee must build a system that substantially uses the design and technologies upon which its preference award is based"?
  - c. During the conduct of the testing, how many base stations were built for each of the four recipients? How far apart were the base stations? During the course of the site visits, how many handsets were the Commission personnel able to verify were deployed? How many hand-offs were recorded by Commission personnel?
12. a. During the course of the Committee's deliberations concerning the auctioning provisions of last year's "Omnibus Budget Reconciliation Act", there were varying estimates of the amount of revenue that would be received by the Government as the result of assigning frequencies by competitive bidding. It is my understanding that the most recent estimate by the Office of Management and Budget is \$30 per "pop" (unit of population). Using this estimate, please furnish the Subcommittee with an analysis of revenue foregone directly for the four licenses that will not be

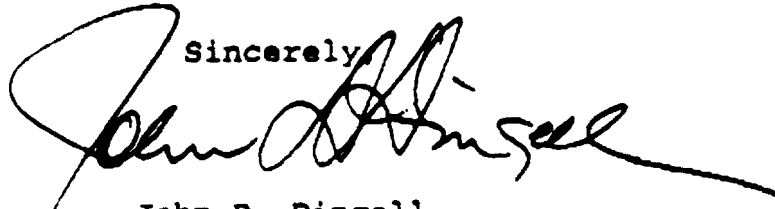
issued by competitive bidding procedures if the Commission issues licenses to the four recipients of "Pioneer Preference" awards.

- b. In addition, please furnish the Subcommittee with your analysis of the effect that issuing these four licenses at no cost to the licensee is likely to have on those who might be prospective bidders for one of the remaining licenses. Please make every attempt to quantify the impact of issuing these licenses without a cost on the bidding strategies of potential bidders.

Please respond to these questions no later than the close of business on Friday, May 27, 1994. If you have any questions regarding the Subcommittee's investigation, please do not hesitate to contact David Leach of the Committee staff at (202) 225-3147, or Reid P.F. Stuntz of the Subcommittee staff at (202) 225-4441. Thank you for assisting the Subcommittee in its investigation of this matter.

With every good wish.

Sincerely,



John D. Dingell  
Chairman  
Subcommittee on Oversight  
and Investigations

cc: The Honorable Dan Schaefer, Ranking Republican Member  
Subcommittee on Oversight and Investigations

The Honorable James Quello, Commissioner

The Honorable Andrew Barrett, Commissioner

The Honorable Ervin Duggan, Former Commissioner

The Honorable Reed Hundt, Chairman  
Federal Communications Commission

Attached Service List